

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DELAWARE TERMINAL)	
COMPANY,)	
)	
Appellant, Employer below,)	
)	
v.)	C.A. No. 05A-12-001-PLA
)	
RICHARD HARMON)	
)	
Appellee, Employee below.)	

Submitted: September 20, 2006

Decided: January 2, 2007

ON APPEAL FROM THE INDUSTRIAL ACCIDENT BOARD
AFFIRMED in part, **REVERSED** in part.

This 2nd day of January, 2007, upon consideration of the appeal of Delaware Terminal Company from the decision of the Industrial Accident Board, it appears to the Court that:

1. Richard Harmon (“Harmon”) sustained a compensable low back injury while employed with Delaware Terminal Company (“DTC”). The injury was treated as a “medical-only” claim and, as such, Harmon received only medical expenses from DTC. Approximately one year after he sustained the work injury, Harmon filed a petition to determine compensation due (“medical expenses petition”) for further medical

expenses. He also filed a petition seeking permanent impairment benefits (“permanent impairment petition”) for an alleged 17% loss of use of the lumbar spine. The petitions were consolidated and the Industrial Accident Board (“Board”) held a hearing on the matter. The Board ultimately denied the permanent impairment petition and granted the medical expenses petition. DTC timely appealed the Board’s decision to this Court.¹

2. As early as 1998, Harmon began to have low back and left leg problems. He received treatment from his family physician, which included several prescription medications, a back brace, and physical therapy. He was placed on light duty work restrictions with an order not to engage in lifting of any kind. Over the next several years, Harmon would continue to seek treatment from several doctors as his back and leg problems persisted.²

3. On March 11, 2004, while working for DTC, Harmon was struck by a cable that came loose from a docking ship. The impact from the cable caused Harmon to flip over and land on his left side and hand. Harmon did not note immediate pain and continued working. It was not

¹ See Docket 1; Docket 3 (Board Decision), p. 2; Docket 7, p. 4; Docket 8, p. 1.

² See Docket 3 (Board Decision), p. 2-11; Docket 7, p. 4-12; Docket 8, p. 1-6.

until five weeks after the work accident that Harmon began suffering from more severe pain in his back than he had in the past.³

4. In May 2004, Harmon was examined by Dr. Ross M. Ufberg. Dr. Ufberg diagnosed Harmon with exacerbation of discogenic spondylosis in the lumbar spine, including spinal stenosis. He prescribed Harmon multiple medications, and also started him on a home TENS unit in an effort to reduce some of his back and leg pain. Dr. Ufberg noted that, while Harmon did have pre-existing back problems, they became significantly worse after the work accident. Dr. Ufberg continued to treat Harmon through September 2004.⁴

5. In August 2005, Harmon was examined by Dr. Bruce Grossinger. Dr. Grossinger opined that the March 2004 work accident did not aggravate, worsen, or anatomically or functionally change Harmon's chronic long-standing low back and lower extremity pathology. He believed that Harmon's symptoms returned to a baseline after eight weeks following the work accident and that he did not require any further treatment after a twelve week period at maximum. Dr. Grossinger concluded that Harmon

³ *Id.*

⁴ *Id.*

sustained, at most, a transient soft tissue injury to his low back as a result of the work accident and that no further treatment should be required.⁵

6. On September 20, 2005, the Board held a hearing on Harmon's consolidated petitions for medical expenses and permanent impairment. At the hearing, Harmon testified. Drs. Ufberg's and Grossinger's depositions were read into evidence. In rendering its decision, the Board found Dr. Grossinger's opinions persuasive, and rejected the opinions of Dr. Ufberg. Specifically, the Board agreed with Dr. Grossinger that Harmon did not have a permanent impairment, and that, as a result of the work accident, he sustained only a short term injury that usually resolves within three months. The Board also agreed with Dr. Grossinger's findings that physical therapy treatment was reasonable only through July 2004, and that it was reasonable for Harmon to continue with his home TENS unit as well as continue on his prescription medications. As a result, the Board gave no award to Harmon for a permanent impairment, but did award Harmon "medical expenses for physical therapy visits following the work accident through July 2004, and continuing medical visits to monitor medications and TENS unit usage."⁶ The Board also awarded Harmon "one attorney's fee and [his] medical

⁵ *Id.*

⁶ Docket 3 (Board Decision), p. 16-17.

witness fee.”⁷ DTC has now appealed the Board’s decision to this Court with respect only to its award for “continuing medical visits to monitor medications and TENS unit usage.”⁸

7. DTC makes only one claim on appeal. Boiled to its essence, DTC’s argument suggests that the Board’s award of future medical expenses is not “causally related” to Harmon’s work accident. More specifically, it contends that, in light of the Board’s acceptance of Dr. Grossinger’s opinions on the issue of medical expenses, the Board’s conclusion that it was reasonable for Harmon to continue with his home TENS unit, as well as continue on his prescription medications, is not supported by substantial evidence given that Dr. Grossinger never opined that such continuing treatment was related to the work incident. DTC maintains that the Board’s award of future medical expenses is “logically irreconcilable” with its acceptance of Dr. Grossinger’s opinion that Harmon sustained nothing more than a strain or soft tissue injury from the work accident – an injury that, according to Dr. Grossinger, completely resolved within three months of the accident. Moreover, DTC argues that, because the Board rejected Dr. Ufberg’s opinion that any future medical treatment is a result of the work

⁷ *Id.*, p. 17.

⁸ *Id.*, p. 16-17; Docket 7, p. 4.

accident, the Board's decision to award future medical expenses is not the product of an orderly and logically deductive process, nor is it based on substantial evidence in the record. DTC, therefore, requests that this Court reverse the Board's award of future medical expenses.⁹

8. Harmon responds by contending that the Board's decision to award him future medical expenses for the monitoring of his medications and TENS unit usage is supported by substantial evidence and is free from legal error. Harmon argues that, given Dr. Grossinger's opinion that he should continue taking his prescriptions and using his TENS unit, it was reasonable for the Board to award future medical expenses related to the monitoring of his prescription intake and TENS unit usage. In short, Harmon maintains that the Board's reliance on Dr. Grossinger's opinion constitutes substantial evidence to support its decision.¹⁰

9. Appellate review of a Board decision is limited. The Court's function is confined to determining whether the Board's decisions are free from legal error, and whether substantial evidence supports the Board's findings of fact and conclusions of law.¹¹ Questions of law, which arise in

⁹ See Docket 7, p. 14-16.

¹⁰ See Docket 8, p. 9-13.

¹¹ *Bermudez v. PTFE Compounds, Inc.*, 2006 WL 2382793, at *3 (Del. Super. Ct. Aug. 16, 2006).

ascertaining if there was legal error, are subject to *de novo* review which requires the Court to determine whether the Board erred in formulating or applying legal precepts.¹² “Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is ... more than a scintilla but less than a preponderance of the evidence.”¹³ The Court “does not weigh the evidence, determine questions of credibility, or make its own factual findings. ... It merely determines if the evidence is legally adequate to support the Board’s decision.”¹⁴ “Application of this standard of review ‘requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did.’”¹⁵

10. “For medical expenses to be compensable,” under Del. Code Ann. tit. 19, § 2322, “they must be reasonable, necessary, and causally

¹² *Id.*

¹³ *Breeding v. Contractors-One, Inc.*, 549 A.2d 1102, 1104 (Del. 1988).

¹⁴ *Adams v. Shore Disposal, Inc.*, 1997 WL 718651, at *4 (Del. Super. Ct. July 29, 1997) (citation omitted).

¹⁵ *Jackson v. State*, 1997 WL 1048181, at *4 (Del. Super. Ct. Aug. 28, 1997) (quoting *Nat’l Cash Register v. Riner*, 424 A.2d 669, 674-675 (Del. Super. Ct. 1980)).

related to the work accident.”¹⁶ “Whether medical services are necessary and reasonable or whether the expenses are incurred to treat a condition causally related to an industrial accident are purely factual issues within the purview of the Board.”¹⁷ Therefore, “[w]hen the Board reaches a factual conclusion as to the compensability of certain costs, this Court must only determine whether that conclusion is supported by substantial evidence.”¹⁸

11. As previously stated, in determining whether Harmon should be awarded future medical expenses for the injury he sustained while employed at DTC, the Board relied solely on Dr. Grossinger’s opinions and expressly rejected the opinions of Dr. Ufberg. As stated by the Board in the “Medical Expenses” and “Statement of the Determination” sections of its decision:

The Board agrees with Dr. Grossinger that the nature of the lumbar strain that Claimant sustained in the work accident represents a *short term injury* that usually resolves within three months, or twelve weeks. Therefore, the Board finds Dr. Grossinger’s conclusion that the physical therapy treatment was reasonable only through July 2004. ... The Board rejects Dr. Ufberg’s opinion that continuing physical therapy treatments through September 2005 have been reasonable, necessary and causally related to the work accident based on the nature of the

¹⁶ *Standard Distrib., Inc. v. Hall*, 2006 WL 2714960, at *4 (Del. Super. Ct. Sept. 20, 2006). See also *Bullock v. K-Mart Corp.*, 1995 WL 339025, at *2 (Del. Super. Ct. May 5, 1995) (“[M]edical costs incurred must be reasonable and necessary and must be causally related to the industrial accident.”).

¹⁷ *Bullock v. K-Mart Corp.*, 1995 WL 339025, at *2.

¹⁸ *Riverside Hosp. v. Morris*, 1995 WL 44280, at *4 (Del. Super. Ct. Jan. 30, 1995).

work injury and Claimant's *pre-existing medical history* as set forth by Dr. Grossinger. ... *Dr. Grossinger nevertheless agreed that it is reasonable for Claimant to continue with his home TENS unit as well as continue on his prescription medications. As a result, the Board approves of the continuing medical visits with the treating physician to monitor such treatment.*

Based on the foregoing, the Board ... awards Claimant medical expenses for ... continuing medical visits to monitor medications and TENS unit usage.¹⁹

12. It is clear that the Board's decision to award Harmon future medical expenses was founded upon Dr. Grossinger's recommendation that Harmon should continue taking his prescription medications and continue with the TENS unit. What is not clear is whether Dr. Grossinger offered this recommendation because of Harmon's "pre-existing medical history" (specifically his chronic back problem), or because further treatment was needed for the work injury. The record reveals that Dr. Grossinger never opined that Harmon's need for future medical treatment would be "causally related" to his work injury. In fact, to the contrary, as the Board articulated in its decision, Dr. Grossinger opined that Harmon "did not require any further treatment [for the work injury] after a twelve week period at maximum[,]" and that "Dr. Grossinger concurs ... that after a twelve week period, at most, no further treatment would have been required" for

¹⁹ Docket 3 (Board Decision), p. 14-17 (emphasis supplied).

Harmon's work injury.²⁰ It would, therefore, seem illogical for Dr. Grossinger to recommend further treatment for Harmon's work injury given his opinion that no further treatment was required and that Harmon's injury had completely resolved within three months of the accident. The more plausible explanation would be that Dr. Grossinger recommended the further treatment due to his finding that Harmon suffers from a long-standing history of back trouble unrelated to the work injury. While the Court is mindful that its function is not to make its own factual findings or interpret the evidence, the fact remains that Dr. Grossinger's opinions and conclusions provide *no* support for the finding that Harmon's future medical treatment will be "causally related" to the work injury he sustained at DTC.

13. What is more, in reviewing the entire record, including all of the testimony and exhibits before the Board,²¹ there is no other evidence that would be legally adequate to support a finding that Harmon's future medical treatment is "causally related" to his work injury. While there is a plethora of evidence to suggest that Harmon will certainly require future medical treatment for his back, there is no evidence to support the finding that future

²⁰ *Id.*, p. 8, 11.

²¹ *See Goldsmith v. Unemployment Ins. Appeal Bd.*, 1982 WL 591942, at *2 (Del. Super. Ct. Mar. 9, 1982) ("This Court ... must examine the *entire* record and determine whether on the basis of *all* the evidence ... the Board could fairly and reasonably have reached its decision.") (emphasis in original).

treatment will have a causal connection to his work injury. The evidence merely points towards a need for future medical treatment due to Harmon's pre-existing back injury. Further, the evidence referred to by Harmon does not support a causal connection between the work injury and his future medical treatment; and a majority of the evidence cited by Harmon consists of Dr. Ufberg's opinions and findings, which were rejected by the Board.

14. Therefore, given that the Board expressly accepted Dr. Grossinger's opinions when it stated it "agrees with Dr. Grossinger that the nature of the lumbar strain that Claimant sustained in the work accident represents a *short term injury that usually resolves within three months, or twelve weeks[,]*"²² and further because there is no other evidence in the record to support the Board's finding that Harmon's future medical treatment will be "causally related" to his work injury, the Court concludes that the Board's decision is not based on substantial evidence.

²² *Id.*, p. 14 (emphasis supplied).

15. Accordingly, the Board's decision is **REVERSED** with respect to the award of "medical expenses ... for continuing medical visits to monitor medications and TENS unit usage."²³ The Board's decision in all other respects is **AFFIRMED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

cc: Michael R. Ippoliti, Esq.
Matthew M. Bartkowski, Esq.

²³ *Id.*, p. 17.